

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**A.H., Appellant**

**and**

**U.S. POSTAL SERVICE, STOCKTON  
PROCESSING & DISTRIBUTION CENTER,  
Stockton, CA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 08-825  
Issued: October 6, 2008**

*Appearances:*

*Norman F. Nivens, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 24, 2008 appellant, through counsel, filed a timely appeal of a December 11, 2007 merit decision of the Office of Workers' Compensation Programs, terminating her compensation benefits on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination decision.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation benefits effective December 23, 2007 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

**FACTUAL HISTORY**

On November 20, 1998 appellant, then a 43-year-old general clerk, filed a claim for an occupational disease. She alleged that on October 21, 1998 she first became aware of her carpal

tunnel syndrome and realized that it was caused by her federal employment. Appellant performed repetitive typing and as a result she experienced pain in both wrists, worse on the right. The Office accepted the claim for bilateral carpal tunnel syndrome and right trigger finger. It authorized carpal tunnel and right trigger releases which were performed between 1999 and 2006.

On October 25, 2005 appellant returned to modified-duty work eight hours per day. She worked intermittently until August 31, 2006. At that time appellant was working four hours per day.

By letter dated January 22, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a February 28, 2007 medical report, Dr. Auerbach reviewed the history of appellant's employment-related injuries and medical treatment. He noted her complaints of constant pain in both forearms, wrists and hands with tingling in the thumbs, middle and ring fingers and volar palm which radiated up the middle and ulnar side of both forearms, right greater than left. Appellant had perceived weakness of bilateral hand grasp. On physical examination, Dr. Auerbach found no obvious muscle atrophy of either arm or forearm, that appellant could barely make a fist with both hands, no obvious thenar, hyperthenar or intrinsic muscle atrophy of either hand, barely visible carpal tunnel scars and no triggering of the ring fingers of either hand. He also reported grip measurements, noting that grasping the Jamar Dynamometer caused pain in appellant's wrists and hands bilaterally. On neurological examination, Dr. Auerbach found deep tendon reflexes to be +2 in the upper extremities, normal gross sensation to touch and pinwheel but found decreased sensation on light touch in the ulnar fingers of both hands. There was tenderness on volar wrist compression bilaterally and a positive Tinel's sign on both wrists, righter greater than left with tingling into the fingers of both hands. Dr. Auerbach reported a positive Tinel's sign on tapping the inner side of the elbow with tingling in an ulnar nerve distribution down both forearms and hands. Appellant had normal range of motion of both wrists. During the evaluation, she intermittently demonstrated and sighed complaining about pain and tingling in both hands and wrists.

Dr. Auerbach provided a detailed review of appellant's medical records. He stated that she sustained chronic bilateral upper extremity repetitive stress syndrome with a history of bilateral carpal tunnel syndrome and trigger fingers. Dr. Auerbach stated that appellant was status post bilateral carpal tunnel releases in 1999 and October 2002, right trigger thumb release in May 2006 and right long finger trigger release in March 2006. Appellant had intermittent residual triggering of the middle fingers of both hands and evidence of chronic residual carpal tunnel syndrome due to median nerve entrapment at the wrists bilaterally with evidence of chronic nerve entrapment syndrome of the ulnar nerves at the elbow cubital tunnel syndrome.

Dr. Auerbach opined that appellant's bilateral upper extremity problems had stabilized. He stated that they were due to a combination of repetitive stress secondary to her work at the employing establishment and an aggravation of her nonindustrial thyroid condition. Dr. Auerbach opined that appellant reached maximum medical improvement on the date of his examination. He determined that 80 percent of her permanent disability of the upper extremities

was related to her employment and 20 percent was related to her nonwork-related hypothyroid condition. Dr. Auerbach stated that appellant was not able to perform work as a general clerk if she needed to use her bilateral upper extremities in any way. Appellant could not push, pull or lift any weight with both upper extremities. In addition, she could not perform repetitive movements involving her wrists or elbows.

In a work capacity evaluation (Form OWCP-5c) dated February 23, 2007, Dr. Auerbach stated that appellant would never be able to return to work to her date-of-injury position. He advised that she could not reach or reach above her shoulder, which were permanent.

On March 12, 2007 the employing establishment offered appellant a modified-duty position of security badge checker effective March 15, 2007 based on the physical restrictions provided by Dr. Auerbach. The position involved sitting at the main entrance of a building checking to ensure that all employees entering the building displayed a current identification/security badge. It also involved intermittent checks of the workroom floor to make sure all employees properly displayed their badges while working. These duties were to be performed up to and not more than eight hours per day. If appellant encountered an employee without an identification/security badge, she was instructed to notify a supervisor by radio. She was also instructed to stay within her restrictions.

On March 16, 2007 appellant informed the Office that her attending physician stated that the description of the offered position was too vague to make a suitability determination.

The employing establishment amended the March 12, 2007 job offer to reflect the requirement that appellant walk to a supervisor to provide notification of an employee without an identification/security badge. The physical requirements of the position involved no reaching above the shoulders, twisting, repetitive movements of the wrists and elbows and pushing/pulling and lifting.

By letter dated March 22, 2007, the Office requested that Dr. Auerbach review the modified-duty job offer and determine whether appellant could perform the duties of this position. After reviewing the job description and his prior report, Dr. Auerbach stated on April 13, 2007 that appellant could perform the modified position.

On April 19, 2007 appellant advised the employing establishment that she was unable to perform the duties of the offered position. She stated that, although the initial entrance to the building had a turnstile, the door leading into the employee's entrance was glass and it had to be pulled open. The employing establishment advised that appellant could contact someone to let her in the door.

On May 7, 2007 the employing establishment advised the Office that appellant refused to return to work.

On May 20, 2007 appellant accepted the employing establishment's modified-duty job offer.<sup>1</sup> On September 14, 2007 the employing establishment advised the Office that she had not

---

<sup>1</sup> On June 4, 2007 appellant filed an application for disability retirement.

returned to work despite her acceptance of the offered position. It noted that appellant had not worked since April 2007.<sup>2</sup>

In reports dated March 15, May 27 and August 14, 2007, Dr. Vincent C. Leung, an attending Board-certified orthopedic surgeon, stated that appellant had symptoms related to her right ring trigger finger. He found that she could perform modified work with restrictions which included typing up to 20 percent of the time and lifting, carrying, pushing and pulling no more than three pounds with each hand up to four hours per day. In a February 26, 2007 treatment note, Dr. Leung prescribed Vicodin and Zantac for appellant's pain.

By letter dated October 1, 2007, the Office advised appellant that the offered security badge checker position was suitable and remained available. Appellant had 30 days to either accept the position or provide an explanation of the reasons for refusing the position. The Office advised her that she would be paid for any difference in salary between the offered position and her date-of-injury position and that she could accept the job without penalty. Appellant was informed that her compensation could be terminated based on her refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

By letter dated October 30, 2007, the employing establishment again advised the Office that appellant never returned to work.

On November 1, 2007 the Office advised appellant that it was aware of her refusal to accept the offered position. It advised her that her reasons for refusing the offered position were not valid. Appellant was given 15 days to accept the position.

On November 5, 2007 the Office received evidence from appellant's attorney in support of her contention that she was unable to perform the duties of the offered position. In letters dated July 6, September 10 and October 29, 2007, appellant's attorney stated that appellant advised him that she could not perform the duties of the offered position because she could not pull open the heavy fire doors that led into the building, workroom floor, lunchroom and her office area, and to exit the restroom with her arms and hands. Appellant explained to him that she could exit by pushing the doors with her buttocks but, she was not able to gain access to the stated areas by pulling on the doors. She was also able to push the restroom door open with her buttocks but, she could not exit until someone entered to assist her with the door.

In the October 29, 2007 letter, counsel stated that it appeared the employing establishment's accommodation of allowing someone to assist appellant to open the door was reasonable but, on many occasions there was no one around to assist her. Appellant had to wait considerable amounts of time for people to arrive to assist her if they arrived at all. Counsel noted the restrictions set forth by Dr. Leung and Dr. Auerbach. He related that appellant attempted to perform the offered position but encountered difficulty with the doors. Counsel stated that Mr. Wagner, a supervisor, was informed about appellant's difficulties with the doors but no reasonable accommodation was provided. Counsel also noted that her medications caused

---

<sup>2</sup> By decision dated May 24, 2007, the Office denied appellant's claim for compensation for total disability during the period April 30 to May 4, 2007 and May 14 to 25, 2007. Appellant is not appealing from the May 24, 2007 Office decision and it is not an issue in the current appeal.

impaired reaction, the ability to think clearly and drowsiness. He stated that Dr. Thuhong T. Truong, a Board-certified family practitioner, opined that appellant could not perform the offered position while taking her prescribed medications because they caused drowsiness. Counsel contended that appellant accepted the March 15, 2007 job offer and attempted to work under her restrictions. He stated that Dr. Leung and Dr. Auerbach were not advised of the fire doors in her work area. Counsel contended that the duties of the offered position were outside the restrictions set by both physicians. He noted that appellant had continuing pain related to her employment-related bilateral carpal tunnel syndrome.

In a September 12, 2007 letter, Mr. Estes stated that appellant never requested him to provide accommodation for opening any doors for her.

On October 22, 2007 Dr. Truong responded to questions posed by appellant's attorney. He stated that appellant could not safely operate a motor vehicle while taking Vicodin three times a day because it caused drowsiness. Dr. Truong also stated that she could not be expected to function adequately at work while taking her medications. He opined that appellant was not able to deal with the fire doors at work without further injuring herself.

In a November 2, 2006 report, Dr. Leung stated that appellant sustained bilateral carpal tunnel syndrome and trigger fingers of the right thumb, long and most recently bilateral ring fingers. He advised that she could not perform her regular work duties but she could work with restrictions. Appellant could lift and/or carry up to 3 pounds frequently and 10 pounds occasionally. For every eight-hour workday, she could stand and/or walk less than eight hours, sit less than eight hours per day and push and/or pull up to three pounds with each hand. Appellant was restricted to occasional climbing, balancing, stooping, kneeling, crouching, crawling, twisting, reaching, handling and fingering. She could frequently feel, see, hear and speak.

In an October 25, 2007 affidavit, appellant stated that she accepted the offered position and attempted to work. She reiterated that she was unable to perform the duties of the offered position and that the employing establishment failed to provide reasonable accommodation. Appellant also stated that sometimes the doors were propped open but not often. She contended that pushing and pulling the doors exceeded the restrictions set forth by Dr. Auerbach and Dr. Leung.

On November 21, 2007 the employing establishment stated that Wanda Smith, an employee, would be appellant's contact for assistance with entering doors. On November 21, 2007 the Office researched the availability of public transportation from appellant's home to work. It discovered that it was sparse and that the employing establishment would check on the availability of carpools to commute to work.

On December 3, 2007 the Office was advised that the employing establishment's inspector general's office had observed appellant driving against her physician's restrictions and opening a truck door without assistance or any noticeable difficulty.

On December 7, 2007 the employing establishment advised the Office that the offered position was still available.

By decision dated December 11, 2007, the Office terminated appellant's compensation finding she refused an offer of suitable work.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.<sup>4</sup> To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup> Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>6</sup>

Section 10.517 of the Act's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>7</sup> Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.<sup>8</sup>

### **ANALYSIS**

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and right trigger finger while in the performance of duty. It subsequently terminated her compensation benefits effective December 23, 2007, finding that she refused an offer of suitable work based on the medical opinion of Dr. Auerbach, an Office referral physician. The issue is whether the Office properly determined that the offered position was medically suitable. The issue of whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.<sup>9</sup>

In a February 28, 2007 report, Dr. Auerbach reviewed a history of appellant's employment injuries and medical treatment. He reported essentially normal findings on physical and neurological examination. Dr. Auerbach stated that appellant sustained chronic bilateral upper extremity repetitive stress syndrome with a history of bilateral carpal tunnel syndrome and

---

<sup>3</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>4</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>5</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>6</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>7</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

<sup>8</sup> *Id.* at § 10.516.

<sup>9</sup> *See Gayle Harris*, 52 ECAB 319 (2001).

trigger fingers. He also stated that she was status post bilateral carpal tunnel and right thumb and long finger trigger releases. Dr. Auerbach found that appellant had intermittent residuals of her accepted employment injuries. He opined that her bilateral upper extremity problems had stabilized. Dr. Auerbach stated that they were a combination of repetitive stress secondary to appellant's work at the employing establishment and aggravation of her nonwork-related hypothyroid condition. He opined that appellant could not perform her regular work duties as a general clerk if she was required to lift any weight with both upper extremities. Dr. Auerbach stated that she could not push, pull or lift any weight with her upper extremities or engage in repetitive movements with her wrists or elbows.

Dr. Auerbach's OWCP-5c form stated that appellant could not work and that she was permanently restricted from reaching and reaching above the shoulder.

In an April 13, 2007 supplemental report, however, Dr. Auerbach opined that appellant could perform the duties of the offered security badge checker position after reviewing a description of the position and his February 28, 2007 report.

The Board finds that Dr. Auerbach's opinion is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence on the issue of the extent of appellant's disability and work restrictions. He found that she was no longer totally disabled due to her employment-related bilateral carpal tunnel syndrome and right trigger finger and that she could perform modified-duty work with restrictions.

On March 12, 2007 the employing establishment offered appellant the position of security badge checker. It required sitting at the main entrance of a building checking to ensure that all employees entering the building displayed a current identification/security badge and intermittent checks of the workroom floor to make sure all employees properly displayed their badges while working. These duties were to be performed up to and not more than eight hours per day. If appellant encountered an employee without an identification/security badge, she was instructed to notify a supervisor by radio. She was also instructed to work within her restrictions.

Subsequently, in response to an attending physician's opinion that the physical description of the offered position was too vague, the employing establishment amended the March 12, 2007 job offer by requiring appellant to walk to a supervisor to provide notification about an employee who did not have an identification security badge. It listed the physical demands of the position which included no reaching above the shoulders, twisting, repetitive movements of the wrists and elbows and pushing/pulling and lifting. The Board finds that this position conformed to Dr. Auerbach's work restrictions.

The Board finds that the security badge checker position was medically suitable. The weight of the medical evidence establishes that appellant was no longer totally disabled from work and has the physical capacity to perform the duties listed in the amended March 12, 2007 job offer.

The Office notified appellant of its finding that the security badge checker job offer was suitable and of the consequences for not accepting a suitable offer. Prior to the issuance of this letter, appellant accepted the offered position. However, she did not return to work. Although

appellant contends that she returned to work and was unable to perform the duties of the offered position because she could not pull open the doors to the entrance of the employing establishment's building, she did not submit any evidence to substantiate her allegations. The employing establishment advised the Office that appellant accepted the job offer but never returned to work. It stated that she had not worked since April 2007. Based on the foregoing, the Board finds that appellant's failure to report to work constituted rejection of the offered position.

After the issuance of the Office's suitability letter, the employing establishment again informed the Office that appellant had not returned to work.

In accordance with established procedures, the Office found that appellant's reasons for refusing the position were not valid and provided her an additional 15 days to accept the position prior to termination of compensation.

Appellant stated that she could not use her arms and hands to pull open heavy fire doors that led in the building, workroom floor, lunchroom, her work area and restroom. She stated that she had to obtain assistance from another person to enter the doors. Appellant related that the employing establishment's offer to accommodate her by designating someone to help her enter the doors was reasonable but that no one was around to help her and Mr. Estes and Mr. Wagner did not respond to her requests for help. Mr. Estes, however, stated that she never requested him to accommodate her problem with opening doors. The employing establishment designated Ms. Smith as appellant's contact person to help her open doors.

Appellant submitted Dr. Truong's October 27, 2007 report. Dr. Truong stated that she could not drive a car or be expected to perform adequately at work while taking her medications because they caused drowsiness. Appellant opined that she was unable to handle the doors at work without further injuring herself. Dr. Truong did not indicate that he reviewed a description of the offered position. Further, he did not provide any medical rationale explaining how or why appellant's medications prevented her from performing the offered position. The Board finds that Dr. Truong's report is insufficient to support appellant's refusal of suitable work.

Dr. Leung's November 2, 2006 report stated that appellant sustained impairment causally related to her employment-related injuries. He stated that she could perform modified-duty work with restrictions which included lifting and carrying up to 3 pounds frequently and 10 pounds occasionally, standing, walking and sitting less than eight hours per day and pushing and pulling up to 3 pounds. Dr. Leung stated that appellant could occasionally climb, balance, stoop, kneel, crouch, crawl, twist, reach, handle and finger. The Board finds that the offered position conforms to Dr. Leung's restrictions.

The employing establishment stated that appellant had been observed driving which was against her physician's restrictions and opening a truck door without assistance or any noticeable difficulty. It also planned to inquire about carpool service for appellant as public transportation was not readily available for her commute to work.

The Board finds that the job offered was medically and vocationally suitable and the Office followed its procedures prior to termination of compensation.



**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation benefits effective December 23, 2007 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board